SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

~~MISC.~~ NO. 953

VINCENT MAURO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION AND APPENDIX FOR PETITIONER

Vincent Mauro
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Petitioner in propria persona

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

MISC. NO._____

VINCENT MAURO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled cause on September 5, 1968.

OPINION BELOW

The Court of Appeals rendered its *per curiam* opinion on September 5, 1968, which is unreported. A copy of the opinion is set forth in the appendix. (A-2).

JURISDICTION

The judgment of the Court of Appeals, affirming the district court's denial of a motion filed pursuant to Title 28, United States Code, Section 2255, was entered September 5, 1968. An Order extending the time in which to file a petition for writ of certiorari to and including February 3, 1969, was entered by Mr. Justice Harlan on November 13, 1968. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Whether the failure of both the trial court and counsel to advise a defendant, prior to his entering a plea of guilty, that he would be ineligible for probation or parole vitiates a plea of guilty to narcotic offenses if the defendant too is unaware of the unique statutory provision rendering one convicted of narcotic violations ineligible for probation or parole?

2. Whether one seeking vacation of his judgment of conviction and sentence pursuant to Title 28, United States Code, Section 2255 upon the ground that his plea of guilty to narcotic violations was tendered without understanding of the consequence of the plea must allege innocence?

STATUTORY PROVISIONS INVOLVED

Title 28, United States Code, Section 2255:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that

the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A Motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, *** the court shall vacate and set the judgment aside ***.

STATEMENT OF THE CASE

Petitioner, on March 4, 1963, entered a plea of guilty to ten counts charging violations of the federal narcotic laws, Title 21, Sections 173, 174. Thereafter, March 11, 1963, concurrent fifteen-year terms were imposed on each of the ten counts by the Honorable Thomas F. Croake, United States District Judge for the Southern District of New York. On the same day Judge Croake sentenced petitioner to a concurrent five-year term under petitioner's March 21, 1962, plea of guilty to bail jumping.[1]

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[1]The bail jumping conviction and sentence is not an issue in the instant proceeding.

On September 25, 1967, petitioner filed a motion to vacate the narcotic convictions and sentences pursuant to Title 28, United States Code, Section 2255. The Section 2255 motion was predicated upon the fact that both the trial court and retained counsel had failed to apprise petitioner, prior to his guilty plea, that he would be ineligible for probation or parole and that said failure rendered the plea of guilty void because not entered voluntarily with understanding of the consequences.

Appended to the motion was an affidavit from petitioner's retained counsel, Michael P. Direnzo, stating, *inter alia*, neither he nor the court advised petitioner of his ineligibility for probation or parole under the narcotic violations (A-16). Also attached to the Section 2255 motion was the affidavit of petitioner which set forth his nescience of the statutory provision barring him from probation and parole consideration (A-19).

On December 14, 1967, the Hon. Thomas F. Croake denied the motion without a plenary hearing. The denial stated that *Munich v. United States*, 337 F.2d 356, was distinguishable from the case of petitioner, but even if it were not, the court would be disinclined to follow it, and that an allegation of innocence was necessary to support such a motion (A-8). The Second Circuit in a *per curiam* order affirmed the judgment of the district court substantially for the reasons stated in the district court's opinion (A-2).

REASONS FOR GRANTING THE WRIT

I

The opinion of the district court and its *sub silento*

affirmation by the Second Circuit conflicts with the principle enunciated by the Ninth Circuit in *Munich v. United States,* 337 F.2d 356 (1964), holding that a defendant who, at the time of entering a plea of guilty, is unaware of the fact that he will not be eligible for parole, does not plead with understanding of the consequences of such plea. The records of the district court reflect unequivocally that the court did not inform petitioner of his ineligibility for probation or parole (A-14). Likewise, the affidavit of retained counsel, Michael P. Direnzo, establishes that counsel did not inform petitioner of the unique federal law which bars narcotic violators from probation or parole (A-16). Attached to the motion to vacate was petitioner's affidavit alleging his unawareness of his ineligibility for probation or parole at the time his guilty plea was entered.

In *Kercheval v. United States,* 274 U.S. 220, this Court said (at page 223):

> "* * * courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and *with full understanding of the consequences.*" (Emphasis Petitioner's.)

Rule 11, Federal Rules of Criminal Procedure is a codification of the 1927 Kercheval principle. The United States Court of Appeals for the Ninth Circuit, relying on the Kercheval principle and Rule 11, F.R.C.P., vacated the judgment of conviction and sentence in *Munich v. United States;* 337 F.2d 356, upon facts identical to the facts in the case at bar. There the Ninth Circuit said (at page 361):

> "Concerning the first of these reasons, one of the consequences of being convicted of a violation of 21 U.S.C., Section 174, is that the imposition or execu-

> tion of the sentence imposed shall not be suspended, probation shall not be granted, and parole is not available. 26 U.S.C., Section 7237(d), *** In our opinion one who, at the time of entering a plea of guilty, is not aware of the fact that he will not be eligible for probation or parole, does not plead with understanding of the consequences of such a plea."

As stated previously, the facts in *Munich* are nearly identical to the facts in the case at bar. Here, as in *Munich*, the district court did not inform defendant that the sentence could not be suspended, probation could not be granted, and parole was unavailable. In *Munich* the Court did not ask retained counsel if he had advised *Munich* of the nature of the charges. Such was the situation in the instant case. After petitioner's counsel informed the Court that permission was sought to withdraw the plea of not guilty and enter one of guilty, the Court merely asked petitioner if his plea was voluntary with knowledge that a conviction by a plea of guilty is the same as a conviction by a jury trial, and that petitioner was entitled to a jury trial. The only other question by the Court related to whether any promises had been made to induce the plea (A 15). As to understanding the consequences of the plea, not one word was uttered by Judge Croake. Notwithstanding that the record clearly reflects the district court propounded no question or uttered no comment relating to the consequences of the March 4, 1963, guilty plea, the district judge admits in his opinion denying the motion:

> "To understand the nature of a charge it is of course necessary to understand the worst of those consequences that can be foreseen as of the time the plea is taken. A defendant who has been informed of the maximum punishment to which he is exposed

understands the consequences of a guilty plea." (A-5)

If this is the criterion to be followed, why the failure of Judge Croake to comply? The record shows that not a single word was said about punishment or consequences. Contrast this lack of comment regarding punishment or consequences to the question propounded by Judge Charles M. Metzner at the March 21, 1962, bail jumping proceedings wherein petitioner entered a guilty plea:

> "Has he (your attorney) advised you of the punishment which the law provides in this case is a maximum of five years imprisonment and a possible fine of $5,000, or both"? (A-13)

In its denial the district court relied on the statement of petitioner at the March 11, 1963, sentencing requesting the court to "*take into consideration I am a first offender and the minimum sentence is five years.*" (A-9). Of course, this occurred one week *after* the March 4, 1963, plea of guilty and cannot be deemed proof that petitioner was aware of the statutory bar against probation or parole either on March 4, 1963, or March 11, 1963. Had the district court accorded petitioner a hearing on the Section 2255 motion, it could have been established that petitioner learned of the five-year minimum provision from his attorney who urged petitioner to bring that fact to the attention of the court at the sentencing proceedings.

Likewise, the reliance of the district court on the motion of petitioner for reduction of sentence upon his ineligibility for parole (A-10) would have been shown to be misplaced by a hearing on the Section 2255 motion since the testimony of petitioner's counsel would have proven that the motion for reduction of sentence was prepared by

Attorney Direnzo without any participation in or knowledge of the contents of the motion by petitioner.

That the district court entered its denial on fallacious premises undermining the credibility of petitioner is indicated by the erroneous statement of the district judge that petitioner had *"entered this country illegally"* (A-10). The record does not indicate where Judge Croake acquired his false information or how much weight he attributed to it. However, the fact is that petitioner was born in Bronx, New York, U.S.A. The false information of Judge Croake was prejudicial to petitioner.

Equally fallacious and prejudicial is the district judge's reliance on petitioner's having been convicted of an income tax charge. How could this factor be utilized to establish petitioner's knowledge of the statute barring narcotic violators from probation or parole when the income tax violation occurred prior to enactment of the narcotic provision barring narcotic offenders from suspended sentences, probation, or parole.

In its 1966 opinion in *Harper v. United States,* 368 F.2d 53 the Tenth Circuit, relying on Rule 11, Federal Rules of Criminal Procedure and the principle enunciated by this Court in *Kercheval v. United States,* 274 U.S. 220 and *Marchibroda v. United States,* 368 U.S. 487, said:

> "(1) Before accepting a plea of guilty, the court should either advise the defendant, or be certain that the defendant has been advised, of the consequences of a plea of guilty.
>
> "One of the consequences, with respect to which the defendant should be advised, is the maximum sentence which may be imposed on a plea of guilty * * *."

The record establishes that the district judge accepted the plea of petitioner without any comment on the consequences or punishment, and the law is very clear that the burden of proof shifts from the movant in a Section 2255 proceeding to the government once it is shown that the trial court failed to comply with Rule 11 of the Federal Rules of Criminal Procedure. *Rimanich v. United States,* 357 F.2d 537 (5 Cir. 1966); *Domenica v. United States,* 292 F.2d 483 (1st Cir. 1961); *Munich v. United States,* 337 F.2d 356 (9 Cir. 1964).

The record shows that the district judge accepted the plea of guilty without ascertaining whether petitioner was aware of the consequences of his plea, and the affidavit of counsel indicates he did not advise petitioner as to the unique federal law barring narcotic violators from probation or parole. The affidavit of petitioner states that he was unaware of the unique law, and no contradictory proof was offered. All that was tendered were the district court's fallacious premises of "petitioner's prior conviction on the federal income tax charge, petitioner's entering the country illegally, petitioner's statement made one week after the plea that he was a first offender, and the motion for reduction of sentence filed weeks after the plea." These fallacious premises do not refute the record and the affidavit of defense counsel. Consequently, the conflict between the First and Ninth Circuits should be resolved, for the provision of Rule 11, Federal Rules of Criminal Procedure, requiring that a plea be entered with "understanding of the consequences" should not mean one thing in the Ninth Circuit and another in the Second Circuit.

II

The opinion of the district court and its *sub silento*

affirmation by the Second Circuit conflict with the basic principle always adhered to by this court, namely, that guilt or innocence of one seeking vindication of his constitutional rights is not of controlling importance. Cf. *Rogers v. Richmond,* 365 U.S. 534 at 541; *Davis v. State of North Carolina,* 384 U.S. 737 at 739.

In its denial of the Section 2255 motion the district court said:

> "* * * the same standards as would be applied to a motion under Rule 32(d), Fed. R. Crim. P., also apply here. In this circuit an allegation of innocence is required to support such a motion. * * * No such allegation is contained in Mauro's affidavit * * *."

It is well settled that one who enters a guilty plea has no right to withdraw it, and that an application under Rule 32(d) is addressed to the sound discretion of the court. *Callaway v. United States,* 367 F.2d 140 (10 Cir.); *Oksanen v. United States,* 362 F.2d 74 (8 Cir.); *Pinedo v. United States,* 347 F.2d 142 (9 Cir.). Petitioner does not quarrel with the district court's criterion for Rule 32(d) motions; however, he does question the district court's equating a Section 2255 motion with one under Rule 32(d). The motion of petitioner under Section 2255 gave the court below no sound discretion if the plea were entered without an understanding of the consequences. A plea entered under such circumstances would be voidable and constitute an issue of deprivation of procedural due process as guaranteed by the Fifth Amendment to the United States Constitution. Failure of the trial court to comply with the requirements vitiates such plea. The extent of relief and review available on a Section 2255 motion is the same as

that open to a petitioner seeking vindication of his rights by the habeas corpus route. The sole difference is that Congress enacted Section 2255 in order to provide a less cumbersome remedy, through consideration by the sentencing court rather than the district of confinement. *United States v. Hayman,* 342 U.S. 205; *Hill v. United States,* 368 U.S. 424. Innocence was not a ground under habeas corpus and is not a ground under Section 2255, as is pointed out in the Eighth Circuit's decision in *Woodring v. United States,* 248 F.2d 166, where it is stated:

> "The question of a defendant's guilt or innocence is not an issue on a motion to vacate a sentence based upon a plea of guilty." See also, *Hornbrook v. United States,* 216 F.2d 112 (5 Cir.); *Davis v. United States,* 392 F.2d 291 (10 Cir.).

Resolution of the purposes and intent of Rule 32(d) motions and Section 2255 motions is important to the proper administration of justice since many of the courts are applying the incorrect criterion as was done by the district court in the instant case.

CONCLUSION

Wherefore, petitioner respectfully submits that the Writ of Certiorari should be granted to resolve the conflict between the Second and Ninth Circuits in the *Munich* question and to correct the misapplication of the allegation of innocence to a Section 2255 motion.

Dated: 196__

Respectfully submitted,

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Petitioner in propria persona

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 10 - September Term, 1968

(Argued September 5, 1968 Decided September 5, 1968)

Docket No. 32255

UNITED STATES OF AMERICA,

Appellee

v.

VINCENT MAURO,

Appellant

Before:

LUMBARD, Chief Judge,
ANDERSON and SMITH, Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Thomas F. Croake, Jr., denying petitioner's motion, pursuant to 28 U.S.C., Section 2255, to vacate the judgment of his conviction for violation of the narcotic laws.

Affirmed.

IRVING ANOLIK, New York, N. Y.
(Michael P. Direnzo, New York, N. Y.
on the brief for appellant.)

ARTHUR A. MUNISTERI, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, Leonard M. Marks, Assistant United States Attorney, on the brief for appellee.)

PER CURIAM:

We affirm in open court the judgment of the district court which denied Mauro's motion to vacate, pursuant to 28 U.S.C., Section 2255, the judgment of his conviction for violation of the narcotics laws, substantially for the reasons stated in Judge Croake's opinion reported, *sub nom.* United States v. Caruso et al., 280 F. Supp. 371 (1967).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

FRANK CARUSO, SALVATORE MANERI,
VINCENT MAURO, JOHN PAPALIA,
Defendants.

61-Cr.527

APPEARANCES:

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CROAKE, D. J.

MEMORANDUM

Petitioner Vincent Mauro brings the present motion pursuant to 28 U.S.C.A., Section 2255, seeking an order vacating the judgment which convicted him, on his own plea of guilty, of ten counts of violating the Federal Narcotics Laws, 21 U.S.C.A., Sections 173, 174. Mauro was one of twenty defendants named in a thirty-count indictment filed on May 22, 1961.[1] After arraignment, Mauro was released on $50,000 bail, but before the trial began he became a fugitive, the bail was forfeited, and a bench warrant was issued for his arrest.

In early 1962, petitioner was apprehended in the Azores and returned to this country. He was subsequently indicted for bail jumping to which charge he pled guilty before Judge Metzner on March 21, 1962.[2] In the meantime, of course, the original narcotics charges were still pending. On March 4, 1963, following the selection of a jury, Mauro pled guilty before the undersigned to ten of the thirty narcotics violations with which he was charged.[3] By his present motion, petitioner seeks to vacate the judgment of conviction that was entered on his plea of guilty. The motion is made pursuant to 28 U.S.C.A., Section 2255, which permits a prisoner in federal custody to make one motion, at any time, before the court which imposed sentence, if the prisoner claims "that the sentence was imposed in violation of the laws or constitution of the

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[1]For the fate of most of the remaining defendants see *United States v. Ageuci*, 310 F.2d 817 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963).

[2]See Appendix, pp. 10, 11, 12

[3]See Appendix, pp. 12, 13, 14

United States." The essence of petitioner's argument is that because he was unaware at the time he pleaded guilty that he would be ineligible for parole, the guilty plea was involuntary and/or not taken in accordance with Rule 11, Fed. R. Crim. P.

The primary support for Mauro's claim is *Munich v. United States,* 337 F.2d 356 (9th Cir. 1964). In *Munich,* as in the present case, the petitioner's allegation that he was not aware that he would not be eligible for parole was supplemented by an affidavit from his attorney to the effect that the attorney had not so informed him. From this the court concluded "that the Government has not sustained its burden of proving that *Munich* pleaded guilty with understanding of the consequences." 337 F.2d 356 (9th Cir. 1964) at 361.

By its terms, then, the conclusion of the 9th Circuit rests on the proposition that a defendant must plead guilty with an understanding of the consequences. This "Understanding of the consequences" standard is a paraphrase of Rule 11, Fed. R. Crim. P., which provides in pertinent part that a court shall not accept a plea of guilty ". . . without first determining that the plea is made voluntarily with understanding of the nature of the charge." To understand the nature of a charge it is of course necessary to understand the worst of those consequences that can be foreseen[4] as of the time the plea is taken. A defendant who has been

[4]Certain "consequences" of a guilty plea, such as prison treatment, cannot be foreseen and thus cannot be "understood" in the sense in which the 9th Circuit presumably used that term. That is, they cannot be weighed when deciding whether or not to plead guilty.

informed of the maximum punishment to which he is exposed understands the consequences of a plea of guilty. If he is subject to parole, that is a benefit running in his favor. But release on parole is not something to which he has a right and is thus not a foreseeable consequence of his plea.

There is of course a counter-argument: In both the parole and the nonparole situations the potential maximum time served is the same and the decision as to what it will be rests with the sentencing judge. But where there is a possibility of parole, unlike the situation where no such possibility exists, the minimum time served is beyond the control of the sentencing judge and a defendant is entitled to take that into consideration. Thus, the argument in favor of viewing eligibility for parole as a "consequence" of a plea of guilty that must be understood before the court accepts the plea may have some validity in the *Munich* situation. There the defendant pled guilty to only one count of the indictment and he could rationally calculate that the amount of time he would actually spend in prison would depend only in part on the sentencing judge and in part on his eligibility for parole. Mauro, on the other hand, pled guilty to ten separate counts on each of which, according to his own statement, he knew the minimum sentence was five years.[5] Mauro could have been sentenced consecutively on each of the ten counts. He was therefore aware that a possible consequence of his plea of guilty was a minimum sentence of fifty years and a maximum of two hundred years.[6] Thus, even assuming, as Mauro alleges he

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[5]Transcript of the March 11, 1963 hearing before the undersigned, p. 46.

[6]This does not include his liability to sentence on the separate bail jumping charge to which he had earlier pled guilty.

did, that the "usual rules as to eligibility for parole" applied,[7] Mauro could have been given a sentence which would have rendered him ineligible for parole for sixteen and two-thirds years, or one and two-thirds years more than the present term from which he seeks to extricate himself. Although it is not the practice of this court to impose consecutive sentences in such circumstances, this was certainly a potential "consequence" of his pleading guilty that Mauro "understood." Certainly at no time did the undersigned, who accepted the plea and imposed sentence, ever indicate what sentence Mauro would receive.

In light of the fact that even if the normal parole rules applied, Mauro was potentially subject to more than fifteen years in prison without being eligible for parole, his present claim is in essence a claim that he was given a greater sentence than he thought he would receive. It has been repeatedly held that when the plea of guilty was voluntary, disappointment as to the actual sentence imposed is not a valid ground for Section 2255 relief. E.g., *United States v. Page*, 229 F.2d 91 (2d Cir. 1956); *Jackson v. United States*, 214 F.2d 91 (4th Cir. 1954), *cert. denied*, 348 U.S. 900; *Verdon v. United States*, 296 F.2d 549 (8th Cir. 1961), *cert. denied*, 370 U.S. 945.

It is this court's view that *Munich v. United States, supra*, is distinguishable from the present case. But even if it were not, we would be disinclined to follow it. See *Verdon v. United States, supra.* The petition in *Munich*, as

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[7]Mauro affidavit, p. 3. See 18 U.S.C.A. Section 4202, which makes federal prisoners eligible for parole after serving one-third of their sentence in most instances.

here, is basically to withdraw a plea of guilty. Therefore, the same standards as would be applied to a motion under Rule 32(d), Fed. R. Crim. P., also apply here. In this circuit an allegation of innocence is required to support such a motion. *United States v. Norstand Corp.*, 168 F.2d 481 (2d Cir. 1948).[7-A] No such allegation is contained in Mauro's affidavit and his attorney, speaking on Mauro's behalf at the time of sentencing stated, ". . . nothing that I am saying should suggest that I am representing an innocent man; I am not saying that."[8]

But even assuming, arguendo, both that the 9th Circuit decision is correct and should be followed, and that the present situation is not distinguishable from the one which that court confronted in *Munich*, petitioner is still not entitled to the relief he asks. Mauro's contention is ultimately bottomed on the assertion in his affidavit that "at the time I pleaded guilty . . . I was completely unaware of the fact that since this was a narcotics violation, I was not eligible for parole, suspension of sentence, or probation."[9] Notwithstanding Mauro's sworn affidavit, several things belie his assertion.

At his sentencing on March 11, 1963, Mauro read into the record a statement which concluded as follows:

[7-A]Accord, *United States v. Lo Duca*, 274 F.2d 57 (2d Cir. 1960); *United States v. Nagelberg*, 323 F.2d 936 (2d Cir. 1963); *United States v. Hughes*, 325 F.2d 789 (2d Cir. 1964).

[8]Transcript of the March 11, 1963 hearing before the undersigned, p. 36.

[9]Mauro affidavit, p. 2.

> "So, your Honor, in conclusion may I say I trust in your judgment, so please do not sentence me for my name, reputation or nationality, just for the deed in question, and also take into consideration *I am a first offender and the minimum sentence is five years.*"[10]

We can never be certain exactly what was in Mauro's mind *when he stated the minimum sentence was five years. But it seems a fair inference from that statement that Mauro knew he would have to spend at least five years in jail, no matter how lenient the sentencing judge was.*

This inference gains support from the alacrity with which Mauro moved this court for a reduction of sentence on the precise ground as to which he now pleads ignorance, viz., that he was not eligible for parole. At no point in all the time that motion was pending was it ever asserted, orally or in the motion papers, that Mauro was ever unaware that he would be ineligible for parole.[11]

Michael P. Direnzo, Esq., Mauro's attorney at the time of his plea, has submitted an affidavit in which Direnzo corroborates Mauro's allegation that Direnzo never informed him that he was not eligible for parole. Direnzo states that although he, "of course, was completely aware that under the plea involving the narcotics count violations, that the Petitioner would be ineligible for parole, frankly,

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[10]Transcript of the March 11, 1963 hearing before the undersigned, p. 46 (emphasis supplied).

[11]See the Memorandum in 61 Cr. 527 and 62 Cr. 87, dated May 10, 1963, and the papers in support of that motion.

[Direnzo] assumed that the petitioner was aware of this, especially since he had previously served a short sentence in a Federal Penal Institution."[12] Direnzo is a lawyer with many years' experience at the criminal bar. His assumption as to Mauro's awareness of his ineligibility for parole seems well founded in light of Mauro's past record.[13] Indeed, the most striking thing about the Direnzo affidavit is the absence of any statement that his assumption about Mauro's awareness has changed. Beyond that, even if this omission is a mere oversight on Direnzo's part and he has in fact changed his mind, nothing indicates that he has done so on the basis of any evidence stronger than that presently before the court, namely, Mauro's word.

In the last analysis, then, Vincent Mauro is asking this court to take his word that at the time he pled guilty he was unaware that he would be ineligible for parole. But from the time he entered this country illegally in 1931 until the day of his conviction of the offenses for which he is now in prison, Mauro's record has been one of continuous affronts to society. Over the years he has possessed burglar's tools, violated parole, jumped bail, robbed some one, and violated the New York State liquor laws. In 1956 he was convicted of having claimed his deceased grandmother as a dependent when filing his income tax returns. I find that the credibility of Mr. Mauro has worn thin. His affidavit has not changed this court's original conclusion, admittedly shared by his trial counsel, that Mauro knew

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[12]Direnzo affidavit, p. 2.

[13]Prior to the charges involved here, Mauro had a record of six convictions for various crimes which appear in the text, *infra*, at p. 11. (Affidavit of Ass't. U. S. Attorney Paul B. Galvani, p. 3.)

full well at the time he pled guilty that he would not be eligible for parole.

For all of the foregoing reasons the motion is denied.

SO ORDERED.

Dated: December 14, 1967
New York, N. Y.

/s/ Thomas F. Croake
THOMAS F. CROAKE
U.S.D.J.

APPENDIX

Voir dire before Hon. Charles M. Metzner, U.S.D.J., on March 21, 1962.

THE COURT: Mr. Vincent Mauro.
(Defendant Mauro rose.)

THE COURT: Mr. Mauro, are you represented by counsel in this case?

DEFENDANT MAURO: That's correct.

THE COURT: What is his name?

DEFENDANT MAURO: Mr. Direnzo.

THE COURT: Mr. Direnzo is the gentleman sitting two seats to your right?

DEFENDANT MAURO: That's correct.

THE COURT: I understand you wish to change your plea from not guilty to guilty?

DEFENDANT MANERO: [sic] That's right.

THE COURT: Have you discussed this indictment and the allegations in it with Mr. Direnzo?

DEFENDANT MAURO: I have.

THE COURT: Have you told him all the facts and circumstances known to you concerning this indictment?

DEFENDANT MAURO: Yes, your Honor.

THE COURT: And has your attorney consulted with you as to any possible defenses you might have in this case?

DEFENDANT MAURO: Yes, your Honor.

THE COURT: Has he advised you of the punishment which the law, provides in this case is a maximum of five years imprisonment and a possible fine of $5,000, or both?

DEFENDANT MAURO: Yes.

THE COURT: And do you realize the court may impose the same sentence upon your plea of guilty as it could impose if a jury had found you guilty after trial?

DEFENDANT MAURO: Yes, your Honor.

THE COURT: You understand the Constitution of the United States guarantees you the right of a trial by jury?

DEFENDANT MAURO: Yes.

THE COURT: Has anyone attempted to influence you or promise you anything in order to change your plea from not guilty to guilty?

DEFENDANT MAURO: No, sir.

THE COURT: Is this application by you to change your plea from not guilty to guilty being done freely and voluntarily and of your own accord?

DEFENDANT MAURO: That's right.

THE COURT: You may sit down, Mr. Mauro.

* * * * * * * * * * * *

Voir dire before Hon. Thomas F. Croake, U.S.D.J., on March 4, 1963.

MR. DIRENZO: If your Honor please, on behalf of the defendant Vincent Mauro, he now desires to withdraw his plea of not guilty heretofore entered, and now desires the Court's permission to plead guilty to count 1, count 3, count 4, count 5, count 7, count 14, count 20, count 26, count 27 and count 28 of the indictment.

THE CLERK: You waive the reading of the indictment, counselor?

MR. DIRENZO: We do waive the reading of the indictment.

MR. DALY: Your Honor, I believe there was a mistake. According to my records, the defendant Mauro is not mentioned in count 28, but is mentioned in count 30.

MR. DIRENZO: No, counts 26, 27 and 30.

THE COURT: You did say 28.

MR. DIRENZO: I am sorry.

THE COURT: Mr. Mauro, will you please rise?
(Defendant Mauro stood up.)

THE COURT: You have heard what your counsel has stated on your behalf?

DEFENDANT MAURO: I did.

THE COURT: Is that your wish, sir?

DEFENDANT MAURO: That is right.

THE COURT: And you do so voluntarily, knowing that a conviction by a plea of guilty is the same as a conviction by a jury after trial. You understand that you are entitled to a trial of the issues which have been raised by your not guilty plea to the indictment?

DEFENDANT MAURO: Yes.

THE COURT: You know that?

DEFENDANT MAURO: Yes.

THE COURT: And you do so voluntarily?

DEFENDANT MAURO: Yes.

THE COURT: No promises have been made to you by anyone to induce you to make such a plea. Is that right?

DEFENDANT MAURO: That is right.

THE COURT: All right, you may be seated.

* * * * * * * * * * *

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

vs.

VINCENT MAURO,
Petitioner-Defendant,

FRANK CARUSO, SALVATORE MANERI and
JOHN PAPALLA,
Defendants.

STATE OF NEW YORK)
CITY OF NEW YORK) SS:
COUNTY OF NEW YORK)

MICHAEL P. DIRENZO, being duly sworn, deposes and says:

I am an attorney-at-law and maintain an office at 253 Broadway, New York, New York.

I represented the above named Petitioner prior to the entry of his guilty plea, more specifically set forth in the Petition of Vincent Mauro, the sentence and post sentence.

Subsequent to the indictment and prior to the entry of his plea the following were among the motions made in his behalf.

1. For Change of Venue

2. To Suppress
3. For a Bill of Particulars

In connection with the motion to suppress deponent still has in his possession the bugging device, installed in Petitioner's apartment without his consent, knowledge or authorization. The instrument obviously was installed by and through the commission of a crime in gaining access to his premises in his absence. That there was a trespass is an understatement.

The absence of the Petitioner and the "bail jumping" indictment voted against the Petitioner, to all intents and purposes, made the urging or furtherance of the motions moot.

The Petitioner was returned to this jurisdiction and was in the process of going to trial when it was decided, that, because of the virulent publicity, the nature of the charges, etc., the best interests of the Petitioner would be served by the entry of a guilty plea and in consequence thereof, the plea was entered.

I, of course, was completely aware that under the plea involving the narcotics counts violations, that the Petitioner would be ineligible for parole. Frankly, I assumed that the Petitioner was aware of this, especially since he had previously served a short sentence in a Federal Penal institution. Through inadvertence or otherwise I never informed him that under such a plea, he would not be credited with the time, that convicted nonnarcotic violators are allowed. The fact is, that, even the Court did not mention this, either at the time of the plea or sentence.

Petitioner thereafter brought this to my attention, and to

the attention of another attorney, stating that he did not know of the provision in the statute making him ineligible for parole. Further that he would not have so pleaded, if he had known the true consequence of such a plea. There was correspondence between us, in consequence thereof.

I can, and do state that I never advised him, for the reasons hereinabove stated.

I read the affidavit of Irving Anolik, Esq., and repeat and reiterate the allegations contained therein, insofar as reference is made to me.

Sworn to before me

this day of September, 1967

/s/ Michael P. Direnzo
MICHAEL P. DIRENZO

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

vs.

VINCENT MAURO,
Petitioner-Defendant,

FRANK CARUSO, SALVATORE MANERI and
JOHN PAPALLA,
Defendant.

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

The Petition of VINCENT MAURO respectfully shows:

I am the Petitioner-Defendant in the above entitled action and submit this petition pursuant to Title 28, United States Code, Section 2255 for the purpose of vacating the judgment of conviction entered against me, on the 11th day of March, 1963, convicting me, upon my plea of guilty, of several violations of the Narcotics Law and "Jumping Bail" under Indictment No. 61 Cr. 527. I plead guilty to counts 1, 3, 4, 5, 7, 14, 20, 26, 27 and 30. I was sentenced to Fifteen (15) years imprisonment on each by Hon. Thomas F. Croake, United States District Judge for the Southern District of New York. The sentences were ordered to run concurrently. On my plea of guilty to Indictment No. 62 Cr. 87 ("Jumping Bail") I was ordered

confined for a term of Five (5) years and this too was ordered to run concurrently with the sentences under Indictment No. 61 Cr. 527.

At the time of my plea of guilty and sentence I was represented by retained counsel, namely, Michael P. Direnzo, Esq. I had not however, ever been convicted of any Federal narcotics violation although on a prior occasion I had been incarcerated in a Federal penal institution on a tax evasion violation. The gravamen of that charge, consisted in improperly taking my grandmother as a dependent, and accepting the statutory deduction for her as a dependent.

Both at the time that I pleaded guilty and at the time of my sentence I was completely unaware of the fact that since this was a narcotic violation, I was not eligible for parole, suspension of sentence, or probation. The Court did not advise me of these facts and my attorney did not think it necessary to advise me. I later learned from him that he assumed that I was aware of this particular aspect of the Federal Law when I decided to plead guilty, and in consequence thereof failed to so advise me.

My attorney will submit an affidavit supporting this petition which concerns the fact that he had never advised me that I could not be considered for parole or probation in view of the fact that the charges against me consisted of Narcotics Law violations.

I might also add that the United States Attorney never advised me of these facts either.

At the time of my sentence, my attorney advised the Court that he had information that New York State Law

enforcement officers had planted a microphone or "bug" by tresspass in my apartment. There was a serious question as to whether this had been authorized by the Federal or State Governments but it is my belief and firm opinion that the Federal Authorities had received transcripts of the contents of those eavesdrops or at the very least had listened to them (see minutes of sentence 3-11-63 ps. 40-42).

As a matter of fact my attorney Mr. Direnzo specifically informed the Court of the existence of these eavesdrops or "bug." These facts militated strongly in favor of my taking a plea of guilty since it made me feel that I would be unable to refute the contents of those conversations especially when there was no way of my specifically determining whether or not the State Authorities had actually participated actively with the Federal Authorities and to what extent.

I hereby state most emphatically that under no circumstances would I have pled guilty had I known that I was not eligible for parole or similar consideration. It was not until relatively recently that I became aware of the fact that my lack of knowledge of the type of sentence in a narcotics case might be the basis for an application under Title 28 Section 2255. My attorney, Michael P. Direnzo, Esq., was honestly and sincerely surprised when I advised him that I had been unaware of the fact that I was ineligible for parole when I was sentenced and at the time that I pled guilty. Mr. Direnzo therefore advised me of certain cases including *Munich v. United States* (9th Cir. 1964), 337 F.2d 356, where it had been held that the same type of misunderstanding which I had was a proper reason to request relief under Title 28 of the United States Code Section 2255 for the purpose of having my judgment of

conviction vacated.

It must be borne in mind that I had served previous time in a Federal Penitentiary and assumed that since this was a Federal conviction that the usual rules as to eligibility for parole would apply. When I arrived in prison and eventually learned that in narcotics cases the rules were different, I felt at first that I had no remedy, I now realize that Title 28, United States Code, Section 2255 is designed to afford a remedy in cases just like mine.

It is my further position that a plea of guilty is not voluntary in the true sense as it is articulated under a serious mistake as to what it really means. It was my firm belief that my potential period of actual incarceration would be far less than I am now facing because I felt that I would be released on parole. Now in view of the fact that parole is out of the question because of the fact that this is a narcotics conviction I am really facing a far longer sentence than I anticipated or pleaded guilty to. I realize fully that if my request is granted and the sentence is vacated that consequently I could be convicted after trial. I am willing to assume that risk particularly in view of the fact that I do not believe that the Government could have legally proved its case beyond a reasonable doubt. In addition, the defense of eavesdropping would certainly have been raised. Eavesdropping has been a violation of Federal Law before it became a violation binding on the States. *Berger v. New York* (Decided by the Supreme Court of the United States in June, 1967).

My attorney, on his application, will annex an affidavit stating facts and present arguments on the law as well.

In the final analysis it is my hope that this Court will

not deny me my day in Court since I did not knowingly and intelligently agree to admit guilt of a crime to which I would be ineligible for parole. I took the calculated risk of pleading guilty because I felt that with parole as a probability it might be an easier and less expensive method than going through a long drawn-out trial at considerable cost. This situation, however, is no longer the case because my sentence is considerably longer than I believed it could be when I pled guilty.

WHEREFORE, I most respectfully pray that an order be entered vacating my judgment of conviction and directing a new trial or in the alternative granting me a full hearing on the allegations set forth in this petition.

Dated: New York, New York
September , 1967

/s/ Vincent Mauro
VINCENT MAURO

STATE OF GEORGIA)
COUNTY OF FULTON) SS:

VINCENT MAURO, being duly sworn, deposes and says that deponent is the Petitioner-Defendant in the within action; that deponent has read the foregoing Petition and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

Sworn to before me this

day of September, 1967

/s/ Vincent Mauro
VINCENT MAURO

STATE OF GEORGIA)
COUNTY OF FULTON) SS:

On the day of September, 1967 before me personally came VINCENT MAURO to me known, and known to me to be the individual described in, and who executed the foregoing instrument, and duly acknowledged to me that he executed the same.

_____

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 953

VINCENT MAURO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-2) is reported at 399 F. 2d 158. The opinion of the district court (Pet. App. A-3 to A-11) is reported at 280 F. Supp. 371.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1968. By order of Mr. Justice Harlan, the time for filing a petition for a writ of certio-

rari was extended until February 3, 1969, and on January 17, 1969, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was entitled to have set aside his plea of guilty to ten narcotic offenses on the basis of his allegation that at the time of the plea he was unaware he would be ineligible for parole.

STATEMENT

In 1961 petitioner was named as one of twenty defendants named in a thirty count indictment charging various violations of the federal narcotics laws (21 U.S.C. 173, 174). He pleaded not guilty, posted $50,000 bond, but became a fugitive before trial. Trial of ten other defendants was concluded in December 1961. See *United States* v. *Agueci*, 310 F. 2d 817 (C.A. 2), certiorari denied, 372 U.S. 959.

Early in 1962, petitioner was apprehended in the Azores and brought back to the United States. In 1962, he entered a guilty plea to bail jumping, and sentencing was deferred pending disposition of the narcotics case. On March 4, 1963, after selection of a jury, petitioner, who was represented by counsel of his own selection, pleaded guilty to all ten narcotics counts in which he was named. The court questioned petitioner as to the voluntariness of his plea and inquired into his understanding of its meaning and effect (Pet. App. A-14 to A-15). This questioning did not mention parole ineligibility or the sentence which

might be imposed. One week later, on March 11, 1963, petitioner, again represented by his counsel, appeared for sentencing. At the time of allocution, petitioner said: "please * * * take into consideration I am a first offender and the minimum sentence is five years" (App. 23).[1] Petitioner's counsel at that time stated he was not representing that petitioner was innocent (App. 24). The court sentenced petitioner to fifteen years' imprisonment on each count, to run concurrently. Petitioner was also sentenced to a concurrent five-year term for jumping bail.

About six weeks later, on April 30, 1963, petitioner moved for reduction of sentence. Paragraph 7d of his application stated that it was predicated upon the ground: "That no parole is available to the defendant." In paragraphs 8 and 17 the lack of parole eligibility for a narcotics law violator was also noted (App. 27-28). This motion was denied.

On September 25, 1967, petitioner instituted the present proceeding under 28 U.S.C. 2255, claiming that he had entered his guilty plea in ignorance of its consequences. Petitioner submitted an affidavit to the effect that, at the time of the guilty plea he did not know that he would be ineligible for parole (Pet. App. A-19 to A-24). Also submitted was an affidavit from his counsel stating that, while he had "assumed" petitioner knew he would be ineligible for parole, he had not expressly informed petitioner of this fact (Pet. App. A-16 to A-18). The trial court, after consider-

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[1] The court of appeals record on file with the Clerk of this Court has been consecutively paginated and is designated herein as "App.".

ing the affidavits and the record in the case, concluded that petitioner, at the time of the guilty plea, did know of his ineligibility for parole, but that in any event, even if the facts were as petitioner alleged, he would not be entitled to any relief (Pet. App. A-3 to A-11).

ARGUMENT

For the reasons discussed by the trial judge (Pet. App. A-8 to A-11), there is ample basis for the conclusion that petitioner was aware, at the time he entered his guilty plea, that he would be ineligible for parole. Petitioner's own counsel had not explicitly advised him of this circumstance because he "assumed that the Petitioner was aware of this" (Pet. App. A-17). At the time petitioner entered his plea, he was 47 years of age (App. 28) with a criminal record dating back to 1931 (App. 19). The charges against him involved a large scale narcotics conspiracy. Petitioner was a member of the "executive group" that "initiated the various importations and the subsequent distributions and sales of the narcotics" (see 310 F. 2d at 820-821). After his co-defendants were convicted and petitioner returned to the United States, he was held in federal custody in New York City from February 1962 until his plea in March 1963 (App. 19). Petitioner's age, criminal experience, criminal associates, and one year's residence in a federal lockup while waiting for his narcotics trial to start all suggest that petitioner knew the ancillary aspects of any sentence imposed for narcotic offenses. This conclusion is buttressed by the fact that barely a week after his plea, during allocution, petitioner himself asked

the sentencing judge to take into account that he was a first (narcotics) offender but that the minimum sentence was five years. Furthermore, although in April 1963—less than two months after his guilty plea—he expressly mentioned his ineligibility for parole in the course of seeking a reduction in sentence, more than four years elapsed "without any outcry of innocence or injustice" based upon a claim of ignorance of that fact at the time of his plea. *Pinedo* v. *United States*, 347 F.2d 142, 146 (C.A. 9), certiorari denied, 382 U.S. 976.

In any event, as the district judge held (Pet. App. A-6 to A-8), vacation of the conviction is not required because the judge failed to advise him that parole was unavailable before accepting his guilty plea. Awareness of punishment is only one of several factors to be considered in determining the propriety of the acceptance of the guilty plea. "It is not a factor which, alone and bare, demands in its absence a vacation of a sentence. The circumstances in each case are important." *Verdon* v. *United States*, 296 F. 2d 549, 553 (C.A. 8), certiorari denied, 370 U.S. 945. At the time of sentencing, petitioner knew that the minimum sentence under each count was five years and thus knew that he might receive at least a fifty year sentence if the trial court decided to impose minimum sentences but to run them consecutively. Petitioner's actual minimum imprisonment, 15 years, less possible good time allowance, is far less than one third the *maximum* imprisonment imposable (200 years) and is less than one third the maximum if minimum consecutive sentences had been imposed. Petitioner's personal his-

tory was such that he could not reasonably have expected to be a candidate for early parole. Under the circumstances, it is clear that an erroneous reliance upon the possibility of parole played no part in petitioner's deliberate decision to plead guilty after his jury had been selected and his co-defendants already convicted. See *Trujillo* v. *United States*, 377 F. 2d 266 (C.A. 5), certiorari denied, 389 U.S. 899; *Smith* v. *United States*, 324 F. 2d 436 (C.A.D.C.); *Simon* v. *United States*, 269 F. Supp. 738 (E.D. La.); see, also, *United States* v. *Parrino*, 212 F. 2d 919 (C.A. 2), certiorari denied, 348 U.S. 840.[2]

Contrary to petitioner's assertion (Pet. 9-11) the decision below does not rest on petitioner's inability to allege his innocence but on the court's finding, from the files and record, that his plea was in fact entered voluntarily and knowingly.

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[2] *In Munich* v. *United States*, 337 F. 2d 356 (C.A. 9), on which petitioner relies, the defendant pleaded guilty to only one count, so that ineligibility to parole might have affected his awareness of the maximum term. Moreover, that case must be read in the light of the facts there presented, where the judge made *no* inquiry under Rule 11 before accepting a plea of guilty and it was necessary for the government to overcome a presumption that the plea was not knowingly and voluntarily entered. Here the court did conduct an inquiry under Rule 11 before accepting the plea (see Pet. App. A-14 to A-15).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
EDWARD FENIG,
Attorneys.

FEBRUARY 1969.

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